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No. 90-1296

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

REMINGTON ARMS COMPANY, INC., - - - - - - - - - - Petitioner

versus

NICHOLAS N. KING, - - - - - Respondent

On Petition For Writ Of Certiorari To The
Kentucky Supreme Court
From A Decision By The
Court Of Appeals Of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT
FROM A DECISION BY THE
COURT OF APPEALS OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner, Remington Arms Company, Inc., asserts jurisdiction under 28 U.S.C. § 1257(A). The constitutional claims asserted by Petitioner were never preserved by Petitioner or passed upon by the courts below. Petitioner never "specially set up or claimed under the Constitution . . . of . . . the United States" those rights which it now seeks to have the Court enforce, contrary to the requirements of 28 U.S.C. § 1257(A). Petitioner fails to identify where in the record federal constitutional error was preserved. It is impossible for Petitioner to do so due to its lack of presentation below. The Kentucky courts were never apprised of the nature or substance of any federal claim at the time and in the manner required by state law. This fact is documented in the Opinion of the Kentucky Court of Appeals. [Appendix A.] Because these constitutional claims were not properly raised below, this Court lacks jurisdiction to review the decision of the Kentucky appel-

late courts and the Petition should be denied. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

Even if the "not pressed or passed upon" rule is a prudential restriction and not jurisdictional, the Court should decline review of Petitioner's claims as it has done in other recent decisions involving punitive damage awards where constitutional attacks were not properly preserved in the lower courts. *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989); *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988).

Even if preserved, Petitioner's claims have already been determined adversely to it by this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 553 So.2d 537 (Ala. 1989) *cert. granted*, 110 S.Ct. 1780 (1990) (No. 89-1279) decided March 4, 1991.

Furthermore, following the adverse decision of the Kentucky Supreme Court, Petitioner voluntarily paid the judgment without seeking a stay in this Court. Payment of a judgment amounts to accord and satisfaction. *Thorp* v. *Bonnifield*, 177 U.S. 15, 18-19 (1900). There no longer is an actual controversy and the Petition is now moot.

STATEMENT OF THE CASE

A. Statement of Material Facts[1]

On October 13, 1982 Mr. King was teaching gun safety and proper shooting technique at the Jefferson Gun Club. He was shooting a six month old 12 gauge Remington Model

[1]The trial of this action was not stenographically reported but was videotaped. Each videotape cassette has the capacity to record approximately ten hours of proceedings. The record of proceedings in this case consists of ten video cassettes. The first cassette records the proceedings which occurred the day before trial com-

(Continued on next page.)

1100 shotgun. As he fired at a clay target, the gun exploded. A witness, standing directly behind Mr. King, described the explosion as follows:

> . . . And he called for the bird (clay target) and there was just a huge flash. It was right at the edge of dark and it was just the most horrible thing I ever witnessed. The flash created a strobe effect in the air and the air was just filled with particles and everything was just suspended in time. I could see pieces of metal and drops of blood and pieces of tissue. And I could even see one of his tendons whipping out through the air. . . . It was just a horrible thing to see all that blood and flesh, flying out in front of your face.[2]

The explosion blew off Mr. King's left thumb, portions of two fingers and seriously damaged his hand, wrist and forearm. He was hospitalized twice, and had fourteen separate surgeries. Several future hospitalizations and surgeries are necessary.

At trial, King presented expert testimony that Petitioner's Model 1100 shotgun was defectively designed and manufactured. In order to maximize profits, Petitioner manufactured its Model 1100 shotgun barrel using high sulfur, or "resulfurized" steel. This nonstandard grade steel contains substantial amounts of non-metallic sulfide inclusions which crack when stressed by normal shotgun

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(Continued from preceding page.)

menced when the trial court ruled upon motions in limine. Each successive videotape records a day of trial proceedings. In the bottom right hand corner of the video picture, appears a legend stating the date, hour, minute and second. All references to the evidence contained herein document where the matter is located in the video record.

[2]Tape No. 3; 12/7/88; 13:36:14.

shells. No other gun manufacturer in the world uses this high sulfur steel.

King presented overwhelming proof that the high sulfur content of the Remington barrels created a cluster of manganese sulfide inclusions, one or more of which caused Mr. King's gun to explode. After the explosion a metallurgical examination of the King gun revealed a rust pattern which proved the inside of the barrel had been cracked for sometime before it exploded. Having no ability to detect a microscopic crack, Mr. King continued to fire the gun and the crack grew longer to "a critical length". It then exploded with the firing of a normal shell.[3]

At least four years before Mr. King's gun barrel failed, Petitioner was thoroughly warned of the dangers of using "resulfurized steel". It was advised to make its barrels from chrome molybdenum. Shortly after receiving this warning and advice, but without actually changing its steel, Petitioner's 1980 advertisements *falsely* represented that its then current Model 1100 shotguns were made from chrome molybdenum steel![4] Compounding the danger of using "resulfurized steel", Remington Model 1100 shotgun barrels were not thick enough in the chamber area considering the steel used. Some of the barrels were produced even thinner than Petitioner's own inadequate specifications.[5]

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[3]Tape No. 5; 12/9/88; 16:05:30; and Tape No. 6; 12/12/88; 10:26:26.

[4]Trial exhibit 58 was Petitioner's 1980 catalogue. This attractive brochure displayed photographs of the Model 1100 series shotguns and boldly announced:

> From the beginning its engineered tough. Both barrel and receiver start as solid billets of ordinance — quality chrome molybdenum steel.

[5]Tape No. 6; 12/12/88; 10:11:21.

Because the concentration of sulfur inclusions significantly varies among barrels, not all barrels explode. Because the microscopic cracks grow unnoticed in some barrels, there is little chance of detecting a probable failure in advance. The result is that the unsuspecting shooter unknowingly plays "Remington roulette".

Prior to the explosion of Mr. King's gun, Petitioner had actual knowledge of innumerable identical explosions of the same model shotgun. Once these explosions became commonplace, Petitioner instituted a document destruction program which required all records of exploding guns to be destroyed after a period of three years. Because of of this corporate policy, it was impossible for Respondent to determine how many other Model 1100 shotguns had actually exploded like his. Respondent was still able to prove at least 86 prior, similar (if not identical) explosions where serious personal injuries were involved![6] Despite its actual knowledge, Petitioner has never warned anyone of the dangers associated with the use of Model 1100 shotguns. In fact, Petitioner has never even advised the public that the Model 1100s have been exploding, regardless of what Petitioner claims is the cause.

For nine days the jury heard proof concerning the obviousness of Petitioner's defective product, the enormity of Mr. King's injuries and the callousness of Petitioner's indifference to the numerous prior injuries suffered by others as a result of the defective Model 1100 shotguns. The jury unanimously decided upon a verdict of $417,926.47 compensatory damages and $6 million punitive damages.

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[6]Tape No. 3; 12/7/88; 15:50:00.

B. Procedural History

This action was filed in 1983 and tried before a jury five years later. Petitioner did not raise any constitutional attack on any aspect of punitive damages in its Answer, Amended Answer, pretrial Motions or anywhere in the volumes of other pleadings filed before trial. Additionally, no such objection or claim was ever made during the nine day trial.

Under Kentucky law, in order to preserve alleged errors concerning the court's jury instructions, a party must present its position by offering an instruction, by making a motion, or by specifically stating the objection and the grounds for the objection. (Rule 51(3), Kentucky Rules of Civil Procedure.) This procedure allows the trial court an opportunity to act on any claim brought to its attention. For this reason, the day before this case was submitted to the jury, the trial court gave each party a working draft of proposed instructions for study and consideration. At the instruction conference the following morning, each party was permitted unlimited time to state objections and to propose changes or additions. *Petitioner never raised any constitutional claims during this conference or during any other phase of the trial.*

Furthermore, Petitioner never requested or tendered an instruction seeking the "standards" it now proposes. Under the applicable Kentucky law at the time, a jury was permitted to award punitive damages if the tortfeasor's failure to exercise reasonable care was accompanied by a "wanton or reckless" disregard for the lives or safety of the public. *Horton* v. *Union Light, Heat & Power Co.*, Ky., 690 S.W.2d 382 (1985). The court's instructions submitted to the jury in this case properly described punitive

damages and *they defined the necessary prerequisites for such a finding.*

After the trial, Petitioner filed a motion for judgment notwithstanding the verdict, and included for the *first* time a brief reference to the Eighth and Fourteenth Amendments. This reference did not raise any of the arguments now made by Remington. Under Kentucky's well-settled law this was too little and too late because a party cannot raise an objection to the court's instructions for the first time in a motion for new trial or by motion for judgment notwithstanding verdict. *Buchanan* v. *Brown,* Ky., 458 S.W.2d 765 (1970). After considering the post-trial motions, the court found the jury verdict was justified under the evidence presented.

After the post-trial motions, Petitioner appealed to the Kentucky Court of Appeals. Even if it had raised and preserved a federal question at the trial court, any such claim based upon the due process clause of the Fourteenth Amendment was abandoned on appeal. *The only federal constitutional issue Petitioner offered on appeal was an argument claiming that punitive damages violated the Eighth Amendment prohibition against excessive fines.*

Petitioner's "points and authorities" and brief to the Kentucky Court of Appeals never addressed the Fourteenth Amendment. On appellate review, Petitioner limited its constitutional argument to the Eighth Amendment; to-wit: "the award for punitive damages may violate the constitutional prohibition against excessive fines". [Appendix B.] The two paragraph discussion which Petitioner presented in its brief to the Kentucky Court of Appeals does not even mention the Fourteenth Amendment. [Appendix C.]

The Kentucky Court of Appeals confirmed Petitioner's failure to preserve any due process constitutional claim when it found:

> Appellant now contends that this decision was an 'obvious invitation for a due process challenge' based upon the arbitrary lack of standards for punitive damages. Even if this were so, the issue was not raised in the trial court and we cannot *sua sponte* address issues which were never raised, no matter how challenging. [Appendix A.]

The Kentucky Court of Appeals unanimously affirmed the jury verdict. Because the appeal presented no novel questions of law, the court's written opinion was not published. Petitioner sought discretionary review from the Kentucky Supreme Court. That court found Petitioner's appeal unworthy of consideration and denied further review. After the adverse ruling by the Kentucky Supreme Court, Petitioner never sought to have this Court stay the proceedings. Instead, it paid the full amount of the judgment on December 29, 1990. [Appendix D.]

REASONS FOR DENYING THE WRIT

Petitioner now presents three claims, all of which allegedly concern the "due process clause" of the Fourteenth Amendment. None of these issues was properly raised by Petitioner in the state courts. None was passed upon by any Kentucky court.

A. Petitioner's Questions Are Not Preserved For Review By This Court

Not surprisingly, Petitioner has also failed to comply with United States Supreme Court Rule 14.1(h) which mandates a petitioner to:

> . . . specify the stage of the proceedings, both in the court of the first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts . . .

Petitioner cannot comply with this Rule. It cannot point to any place in the record where these issues were properly presented or passed upon. Petitioner's oblique reference to "post-trial motions and . . . the tender of instructions" is of no value because Petitioner never states *where* and how in the instructions these issues were raised. (Petition, p. 5.) Petitioner's tendered instructions actually document the fact that it never raised any of these claims. Finally, Petitioner also fails to state where and how it claims these issues were raised in the Kentucky Court of Appeals.

Petitioner is not the first to attempt a constitutional attack on punitive damages for the first time in a petition to this Court. For example, in the case of *Aluminum Co. of America* v. *Alm*, *cert. denied*, 111 S.Ct. 135 (1990), the Court refused to grant certiorari even though the petition raised some of the same constitutional issues which were preserved in the then pending *Haslip* case.[7]

Alm was a products liability case where the jury found for respondent in the sum of $163,000.00 compensatory damages and $1 million punitive damages. The petition

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[7]Page 4 of the Pacific Mutual's Petition for Writ of Certiorari in *Haslip* makes it clear that:

> Pacific Mutual raised its constitutional challenges to an award of punitive damages at the answer stage, preserved such issues at trial and vigorously advanced those issues on appeal, in its briefs, at oral argument, in the post-trial letter briefs and in its petition for rehearing.

for certiorari in *Alm* presented the following due process arguments:

> Whether an award of punitive damages imposed by a jury without any meaningful standards and in an amount wholly within its absolute discretion comports with the due process clause of the Fourteenth Amendment. (ALCOA's Petition for Certiorari, p. i.)
>
> Whether the due process clause of the Fourteenth Amendment imposes limits on a jury's standardless discretion to assess punitive damages in civil cases. (ALCOA's Petition, p. 9.)

The Court denied certiorari and refused to hold the case even though certiorari had been granted in *Haslip* and that case was pending. As in *Alm*, the Petitioner here failed to raise and preserve any due process issues in the state courts. Like the petition in *Alm*, the Petition for Certiorari here mimics some of the issues which were preserved in *Haslip*.[8] Petitioner asks this Court to grant certiorari here because it *now* makes claims similar to some of those raised in *Haslip*, even though Petitioner never preserved these claims.

Petitioner now claims constitutional questions concerning jury instructions and the amount of punitive damages; but these issues are contrived by Petitioner. The Petition for Certiorari should be denied.

B. All Of The Questions Presented By Petitioner Were Decided Adversely To Petitioner In *Haslip*

In its recent opinion rendered March 4, 1991, this Court held that the "common-law method of assessing punitive damages" does not violate the due process clause of the

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[8]In *Haslip*, all constitutional issues were raised and preserved in the trial and at every level of state court review.

Fourteenth Amendment (p. 14). In *Haslip*, the Court affirmed a punitive damage award and held:

1. The trial court's jury instructions provided adequate standards to insure the jury's "discretion was exercised within reasonable constraints" (p. 17). The jury instructions in the instant case contained the same safeguards as the instructions in *Haslip;*
2. The Court approved punitive damages where the jury applied the "preponderance of evidence" standard. This standard ("if you are reasonably satisfied by the evidence", p. 3, fn. 1) is the same evidentiary standard applied in the instant case; and
3. The post-trial procedures for scrutinizing punitive damage awards insured "meaningful and adequate review" and insures that they will not be "grossly out of proportion to the severity of the offense" (p. 19). Kentucky appellate review procedures are remarkably similar to those used in Alabama.

Because the *Haslip* decision addressed and decided all of the questions belatedly presented by Petitioner in this case, there is no reason to grant certiorari here, even assuming the issues were preserved.

C. Other Reasons For Denying Certiorari

Even if Petitioner had preserved issues not already decided in *Haslip*, there are other significant reasons why certiorari should be denied.

First, because no noteworthy legal issues were preserved in the state courts, the Kentucky appellate decision was not published. This decision below does not constitute precedent. It is important only to the parties here.

Second, there are less intrusive resolutions for these questions in Kentucky. The Kentucky legislature has

already enacted a series of statutes, KRS 411.184 *et seq.*, which comprehensively address the subject of punitive damages. In view of this statutory change, the issues which Petitioner belatedly raises may never be confronted in Kentucky. However, even if confronted, Kentucky courts should be allowed the opportunity to resolve such issues on adequate and independent non-federal grounds; and failing that, the Kentucky Supreme Court should have the opportunity to decide the question of federal law in the first instance. *Crenshaw, supra,* at 80.

Third, Petitioner apparently realized the frailty of its position because it did not seek a stay in this Court; and it paid Respondent the full amount of the judgment on December 29, 1990.

Petitioner's first two questions contend the court's jury instructions violated "due process" of law. Both of these arguments were waived in the trial court by Petitioner's failure to present any constitutional objection to them. Petitioner's post-trial motion cannot cure this lack of presentation. In addition, neither of these questions was raised on appeal. Petitioner's third question concerning excessiveness was briefly mentioned in a post-trial motion, but it was completely abandoned by Petitioner on appeal to the Kentucky Court of Appeals.

I. PETITIONER'S FIRST QUESTION

Petitioner now claims the jury instructions provided no guidance on whether the jury should assess punitive damages or, if so, in what amount. Under Kentucky law Petitioner waived this argument in four distinct ways. *First,* during five years of active pretrial litigation, Petitioner never advanced to the trial court any constitutional argument against punitive damages, against the method by

which they were to be determined, or against the standard of proof required for awarding them. *Second,* Petitioner's failure to raise any constitutional matters continued throughout the nine day jury trial. Petitioner never offered jury instructions setting forth any proposed standards for jury guidance. Nor did it object to the instructions given by the court on the basis of the alleged lack of constitutionality required standards. *Third,* under Kentucky law post-trial motions cannot raise objections to instructions and Petitioner's motion did not cure the trial waiver. Furthermore, Petitioner's post-trial motion did not even suggest the need for any "standards". *Fourth,* Petitioner never presented a due process argument to the Kentucky Court of Appeals. Moreover, even if Petitioner had properly preserved the issues it now raises, this Court's recent decision in *Haslip* is determinative of all questions the Petition presents.

A. Petitioner Failed to Raise the Issue in the Trial Court

At trial Petitioner submitted to the trial court two sets of proposed jury instructions. The first set failed to address any aspect of punitive damages. [Appendix E.] The second set (supplemental instructions) did not request the application of *any* standard even remotely similar to the one Petitioner now seeks. In fact, Petitioner's supplemental proposed jury instructions only requested one of the following: a definition of "malice" as defined by KRS 411.184 or, in the alternative, application of the "wanton and reckless disregard" standard. [Appendix F.] The trial court correctly ruled that KRS 411.184 could not be retroactively applied and therefore it did not instruct on "malice". However, the court did instruct the jury that it could award punitive damages only if it found that Peti-

tioner acted with a "wanton and reckless disregard" for the lives and safety of the public. Although it received the very instruction is requested, Petitioner now claims constitutional error!

Petitioner also claims the Fourteenth Amendment required the jury instructions to contain specific standards for jury guidance on the amount of punitive damage awards. Petitioner never presented these issues to the trial court; it never verbally requested any standards to be incorporated within the court's jury instructions; it never submitted proposed jury instructions containing any such standards; and it did not bring this issue to the trial court's attention in any other manner. Petitioner never contended the jury instructions given were not otherwise appropriate if KRS 411.184 did not apply. Under state practice, the constitutional issues which Petitioner now raises were waived.

Under Kentucky law, if a party desires a jury instruction upon a particular point, it must offer the instruction to the trial court. If it fails to do so, any claim to an objection or to an instruction is waived. *Tucker* v. *Ragland-Potter Co.*, Ky., 148 S.W.2d 691, 697 (1941). A party desiring instructions on its theory of the case has a duty to offer the instruction to the trial court. *Sims Motor Transportation Lines* v. *Foster*, Ky., 293 S.W.2d 226, 229 (1956). It is not error to omit an instruction where the instruction was not submitted by the complaining party. *Mann's Ex'r* v. *Leyman Motor Co.*, Ky., 28 S.W. 2d 956, 959 (1930). Petitioner failed to allow the trial judge any opportunity to consider the constitutional question which it *now* presents. This constitutes an irrevocable waiver.

Although Petitioner contends it preserved a constitutional issue, it fails to advise this Court where it submitted

or requested a more detailed instruction than what the court submitted to the jury. Petitioner's *only objection* to the trial court's punitive damage instructions was a general objection alleging applicability of a state statute, KRS 411.184.[9]

KRS 411.184 was enacted six years after Mr. King's injury, and six months before trial. Petitioner claims "it tendered instructions upon Ky.Rev.Stat. 411.184 to *.186* [which] provides five factors to guide the jury in deciding the amount of the award", implying that it somehow preserved a constitutional claim. (Petition, p. 3, emphasis added.) However, Petitioner cannot even cite where it tendered instructions based upon KRS 411.*186*. A review of the instructions offered by Petitioner proves it did not request the trial court to instruct the jury on any of the five factors which are set forth in KRS *411.186*. Petitioner's sole objection was based upon KRS 411.*184*, and it never raised any issue associated with KRS 411.186. Petitioner did not at trial even cite that statute to the Court!

Petitioner's reference to the five "factors" contained in KRS 411.186 is curious because Petitioner admits the Kentucky appellate court's determination that the statute did not apply to this case is a "purely state law issue". (Petition, p. 3, fn. 3.) Petitioner is apparently suggesting that somehow these factors should have been incorporated into the jury instructions, even though at trial Petitioner never requested that these or any other factors be included in the instructions.

Although Petitioner did not tender any instructions on the five factors, evidence relevant to these factors was pre-

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[9]Tape No. 10; 12/16/88; 11:46:03.

sented to the jury. The five factors and some of the related proof are:

THE LIKELIHOOD THAT SERIOUS HARM WOULD RESULT FROM PETITIONER'S MISCONDUCT:

Long before the Model 1100 shotgun was designed it was common knowledge among metallurgists that, due to its intrinsic weakness, high sulfur, resulfurized steel should not be used in gun barrels. Remington utilized this nonstandard grade of resulphurized steel to reduce its manufacturing costs. No other gun manufacturer in the world used this nonstandard steel.

THE DEGREE OF PETITIONER'S AWARENESS THAT ITS CONDUCT WOULD RESULT IN INJURY:

For over twenty years Petitioner has known its 12 gauge Model 1100 shotguns were dangerous because they were exploding in the chamber, and in many cases causing traumatic injuries including amputation of thumbs and fingers. Despite Petitioner's destruction of records, Respondent proved that Petitioner had notice of 86 prior and similar occurrences.[10]

THE PROFITABILITY OF PETITIONER'S MISCONDUCT:

The purchase price of a Remington Model 1100 shotgun was $500.00.[11] *Even if* Petitioner continued using the nonstandard grade steel, this gun could have been made substantially safer by a $2.40 expenditure.

THE DURATION OF PETITIONER'S MISCONDUCT AND ITS CONCEALMENT:

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[10]Tape No. 3; 12/7/88; 15:50:00.

[11]Tape No. 5; 12/9/88; 11:52:20.

Petitioner had full knowledge that its defective product was perilous to innocent consumers. Rather than correct the design defect, Petitioner chose to institute a corporate policy where evidence associated with the shotgun explosions was destroyed.[12] It designed a litigation plan to blame the consumer for the barrel failures. Petitioner falsely claimed it was impossible for the Model 1100 to explode unless the consumer used dramatically overcharged shotgun shells. This defense was routinely used even when there was uncontradicted evidence the shooter was using new factory shells.[13] At trial, Remington charged Mr. King with making and firing a "stick of dynamite". Petitioner made this claim even though its own expert witness testified that Mr. King's reloader "is the finest reloader that has ever been made", and although not one of Petitioner's twelve expert witnesses could find anything wrong with Mr. King's reloader or his shells.[14] Petitioner's own expert witness conducted an in-court demonstration which conclusively proved that it is all but impossible to even deliberately overload a shell like the one proposed by Petitioner at trial. None of Petitioner's witnesses could explain why some brand new Model 1100 shotguns did, in fact, explode using brand new factory shells, some of which shells were also made by Petitioner. Finally, Petitioner could not explain an incident report which documented that a Remington 1100 barrel failed while being tested by Remington with a new Remington shell at its own manufacturing plant!

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[12]Tape No. 3; 12/7/88; 16:26:45.

[13]Tape No. 4; 12/8/88; 10:01:39 and 10:55:00; and Tape No. 5; 12/9/88; 11:37:50.

[14]Tape No. 8; 12/14/88; 13:42:20.

ACTIONS BY REMINGTON TO REMEDY ITS MISCONDUCT:

> Despite full knowledge of the design defect and the many resulting injuries, Petitioner has not taken any corrective action! What would a responsible manufacturer have done? Realizing the great potential harm which can result from a design or manufacturing defect in a firearm, responsible manufacturers immediately recall an entire line of guns upon learning of a defect. For example, Sturm, Ruger & Company, Inc. recalled all 200,000 guns (P-85 pistols) and offered to eliminate the risk at no cost to the consumer [Appendix G.] This recall was implemented at the first report of danger by a customer and before anyone was injured.

B. Petitioner's Post-Trial Motion Could Not Cure Its Prior Waiver

Petitioner claims it preserved constitutional objections to the trial court's instructions by filing a post-trial motion. Petitioner's motion for judgment notwithstanding verdict, which contains a vague and unsupported, one sentence reference to the Eighth and Fourteenth Amendments, was insufficient to preserve any alleged error in the court's jury instructions.

In Kentucky, post-trial motions are designed to allow the trial court a *second* opportunity to review an issue which was fully raised at trial. *Commonwealth, Dept. of Highways* v. *Enoch*, Ky., 523 S.W.2d 633 (1975). Objections to the court's instructions cannot be made in post-trial motions unless the *precise objections* were *specifically presented* to the trial court *before* the instructions were given to the jury. *Buchanan* v. *Brown*, Ky., 458 S.W.2d 765 (1970). This prohibition is strictly applied to motions for judgments notwithstanding verdict and motions for

new trial. Kentucky courts have uniformly refused to entertain alleged error in instructions presented for the first time in post-trial motions. *Bingham* v. *Davis*, Ky., 444 S.W.2d 123 (1969); and *Scudamore* v. *Horton*, Ky., 426 S.W.2d 142 (1968). This practice insures that all alleged errors are first properly presented to the trial court and that claims of error which are determined valid can be cured.

Petitioner never raised any constitutional objections to the trial court's instructions; and Kentucky law prohibited it from making any such claims for the first time in a post-trial motion or on appeal.

C. Petitioner Also Waived the Question(s) It Now Presents by Failing to Present Them on Appeal to the Kentucky Appellate Court

Petitioner's waiver of Fourteenth Amendment claim(s) persisted beyond the trial court because the question(s) it now asserts were never advanced in Petitioner's state court appeal. This jurisdictional defect is common to all three of the claims which Petitioner now asserts.

Rule 76.12(4) of the Kentucky Rules of Civil Procedure requires an appellant to include in its "statement of points and authorities" all "contentions with respect to each issue of law on which he relies for a reversal listing under each the authorities cited on that point . . ."

In its "statement of points and authorities" for the Kentucky Court of Appeals, Petitioner did not list *any* issue involving the Fourteenth Amendment. Petitioner did not make *any* claim that the Constitution required the jury instructions to contain more specific "standards" for jury guidance. [Appendix B.] Questions not embraced in the statement of points and authorities are waived on appeal.

Stewart v. *Jackson*, Ky., 351 S.W.2d 53 (1961). This Court has previously refused to review state proceedings for this specific reason. *Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962). Finally, no such claims were *ever* made anywhere else in Petitioner's original brief to the Kentucky Court of Appeals. Petitioner's current claims thus were waived in the Kentucky appellate court, even if they were raised earlier in the trial court. *Herrick* v. *Wills*, Ky., 333 S.W.2d 275 (1960). The Kentucky Court of Appeals noted that these issues were not preserved. [Appendix A.]

On appeal, Petitioner made no reference to the Fourteenth Amendment until its reply brief to the Kentucky Court of Appeals. However, the Fourteenth Amendment was not in issue and the reference to it was both untimely and insufficient to create an issue for appeal. *Clark* v. *Clark*, Ky. App., 601 S.W.2d 614 (1980); and *Hall* v. *Arnett By Greene*, Ky.App., 709 S.W.2d 850 (1986).

The requirements for preservation of a federal question were discussed in *Webb* v. *Webb*, 451 U.S. 493, 501 (1981), where the Court held:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts *and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.* (emphasis added)

A federal question must be pursued in the same manner, and with the same degree of specificity, required by the state rules of practice to perfect any other issue. Failure to comply with state procedures similar to those ignored by Petitioner here have resulted in waiver of claimed federal issues in many prior cases. As examples: failure

to raise a "due process" question by answer, motion or otherwise, constituted a waiver under state practice which prevented review by this Court, *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936); failure to comply with state law requiring timely objection forfeited a claimed federal right, *Michel* v. *Louisiana*, 350 U.S. 91, 93 (1955); failure to raise a federal issue until late in the state appellate process waived the federal right, *Chicago, I. & L.R. Co.* v. *McGuire*, 196 U.S. 128, 131-33 (1905); and raising a constitutional issue for the first time on appeal is a waiver, *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945).

"No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . ." *Yakus* v. *United States*, 321 U.S. 414, 444, (1944). This question is not preserved and there is no adequate record to review.

D. The *Haslip* Decision Is Determinative Of This Issue

The jury instructions given by the trial court were remarkably similar to the jury instructions approved in *Haslip*. For example, both sets of instructions provided:

1. Punitive damages were not meant to compensate the plaintiff but were to be in addition to any compensatory damages (instruction 5);
2. Punitive damages are permitted to punish the defendant and deter such conduct in the future (instruction 6); and
3. An award of punitive damages was "discretionary" (instruction 5).

The Court in *Haslip* held: "the application of these standards, we conclude, impose a sufficiently definite and

meaningful constraint on the discretion of fact finders in awarding punitive damages" (p. 18).

II. PETITIONER'S SECOND QUESTION

The second question now advanced by Petitioner asserts that "due process" requires a "clear and convincing" evidentiary standard for punitive damages. Under Kentucky law, this argument was waived in three separate ways. *First* it was never advanced in the pleadings. *Second,* it was not raised during trial. Petitioner never offered instructions setting forth this proposed evidentiary standard. Even though a post-trial motion cannot cure trial waivers, Petitioner filed one but did not raise any constitutional question concerning the evidentiary standard applied by the court. *Third,* Petitioner never presented this constitutional argument to any Kentucky court; and no Kentucky court has ever passed upon this issue. Petitioner has never claimed a "clear and convincing" evidentiary standard was constitutionally required until the filing of its Petition with this Court. Lastly, the preponderance of evidence standard utilized at the trial of this case was expressly approved in *Haslip.*

At trial, Petitioner did not request an instruction seeking application of a "clear and convincing" standard. Petitioner's only mention of "clear and convincing" referred to the term as used in KRS 411.184. The trial court correctly ruled that this statute could not be applied retroactively because KRS 446.080 prohibited retroactivity and because retroactive application would also violate the Kentucky Constitution.

The Kentucky Supreme Court has confirmed that KRS 411.184 cannot be given retroactive application without violating the Kentucky Constitution and other Kentucky

statutes. *Sweasy* v. *King's Daughters Mem. Hosp.*, Ky., 771 S.W.2d 812 (1989); and *Koching* v. *International Armament Corp.*, Ky., 772 S.W.2d 634 (1989). At trial this issue was presented solely as a state issue involving a state statute to be construed by the state courts based upon the state's constitution and common law. This state law determination is both independent and adequate to support the ruling.

Petitioner implies that it tendered proposed jury instructions requesting a "clear and convincing" evidentiary standard. The record belies this claim. Petitioner's proposed jury instructions actually requested a standard which required the jury to "be satisfied" from the evidence that punitive damages were warranted. [Appendix F; Transcript of Pleadings, pp. 832-833.] The trial court utilized the precise standard which Petitioner requested.[15] Now, for the first time, Petitioner claims the trial court committed constitutional error by utilizing the standard of proof the Petitioner sought!

Kentucky law mandates that to be preserved all objections must include precise claims. *Young* v. *DeBord*, Ky., 351 S.W.2d 502 (1961). To preserve alleged error in the trial court's instructions, the specific basis for each objection must be stated. *Johnson* v. *Gaines*, Ky., 313 S.W.2d 408 (1958). Merely offering a general objection

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[15]The precise instruction Petitioner requested provided in pertinent part:

> In order to award punitive damages against Remington, *you must be satisfied* that not only it designed or manufactured a product that was unreasonably dangerous for its intended use and that the Plaintiff was thereby injured, but *that Remington did so in such reckless and wanton disregard* of the rights and safety of persons such as the plaintiff . . . (emphasis added)

does not preserve error. *Marcum* v. *Hedger,* Ky., 303 S.W. 2d 558 (1957).

In Kentucky a party may not assign one reason for objecting to an instruction in the trial court and then rely upon a different reason on appeal. *Boehm* v. *Hishmeh,* Ky., 421 S.W.2d 836 (1967). "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy* v. *Commonwealth,* Ky., 544 S.W. 2d 219, 222 (1977). Unless the stated basis for an objection to a jury instruction is valid, the trial court has no opportunity to correct it's ruling and no error is preserved. *Brumley* v. *Richardson,* Ky., 273 S.W.2d 54 (1954). Appellate review of alleged errors in instructions is limited to reviewing the *specific grounds raised at trial. Burke Enterprises, Inc.* v. *Mitchell,* Ky., 700 S.W.2d 789 (1985).

Petitioner *at most* preserved only its objections to the state issue regarding retroactive application of KRS 411.184. The Kentucky Supreme Court has, on state grounds, confirmed the validity of the trial court's ruling. *Sweasy, Koching, supra.*

Having failed to raise any constitutional question in the trial court, Petitioner could not properly assert any such claim on appeal.[16] Apparently Petitioner realized this because it did not press any Fourteenth Amendment due

[16]Even if Petitioner had properly presented and preserved its argument that the trial court's instructions violated Kentucky law, Petitioner's present constitutional claims still would not be within the "clear intendment" of the objections it made at trial. In both the trial and appellate courts, Petitioner claimed only that KRS 411.184 should apply retroactively. Petitioner's failure to present and preserve any constitutional issues was even more pronounced than the waiver in *Browning-Ferris, supra,* fn. 23, also at pp. 27-28 below.

process claim to the Kentucky Court of Appeals. Therefore, even if raised at trial, it was abandoned on appeal. *Stewart, Herrick,* at pp. 19-20 above.

Petitioner has never before raised any constitutional claim for a "clear and convincing" standard. This issue is not preserved and no review should be made here because this Court lacks jurisdiction to review Petitioner's state law claims. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

At trial the jury was instructed that it could award punitive damages if it was "further satisfied from the evidence" that all the necessary prerequisites for a punitive damage claim were proven (instruction 5). This is the identical standard of proof approved by *Haslip* (p. 3, fn. 1).

III. PETITIONER'S THIRD QUESTION

Petitioner's third issue asserts that the size of the punitive damage award violates the due process clause of the Fourteenth Amendment. Once again, Petitioner does not even attempt to state how and when this alleged issue was preserved. Furthermore, this claim was never advanced as an issue in the Kentucky Court of Appeals.

Kentucky insures a meaningful and adequate review whenever a jury assesses punitive damages. Kentucky law provides that punitive damage awards will be reviewed by Kentucky courts to determine "whether there [is a] sufficient relationship of the punitive damages to the injury and the cause of it to justify the largeness of the verdict". *Hensley* v. *Paul Miller Ford,* Ky., 508 S.W.2d 759, 763 (1974).

The trial court reviewed the jury verdict and found it to be proper, supported by the evidence, and not excessive. Under Kentucky law, this action by the trial judge is presumptively correct. *Davis* v. *Graviss,* Ky., 672 S.W.2d 928

(1984). On appeal, Petitioner never challenged the trial court's findings and never availed itself of the appellate review offered by Kentucky law.

Petitioner never preserved or presented to the Kentucky appellate court a claim that the jury verdict was not supported by the evidence, or that it was the product of bias or prejudice. Nor did Petitioner argue the trial proceedings lacked elements of fundamental fairness or violated the due process clause of the Fourteenth Amendment. Petitioner did not include any of these arguments as issues in its "statement of points and authorities" as required by CR 76.12(4). In fact, Petitioner did not mention these issues anywhere in its brief to the Kentucky Court of Appeals. This failure is a waiver even if properly presented to the trial court. *Stewart and Herrick*, at pp. 19-20 above.

The opinion of the Kentucky Court of Appeals documents Petitioner's failure to present this issue:

> On appeal, Remington does not claim that there was insufficient evidence to support the jury verdict. Neither does it argue that the verdict is so excessive as to appear to have been given under the influence of passion or prejudice. CR 59.01(b); *Davis* v. *Graviss*, Ky., 672 S.W.2d 928 (1984). Instead, the contentions on appeal, in regard to the amount of the verdict, are that punitive damage instructions should have been based upon KRS 411.184 and that the award violates the Eighth Amendment prohibition against excessive fines. [Appendix A.]

Petitioner cites the dissenting opinions in *Crenshaw* and *Browning-Ferris, supra.* However, neither case is authority for accepting certiorari in this case. To the contrary, both cases held that federal constitutional issues must be

properly raised and presented in the courts below or this Court will not address them.

At the trial of this action, the gravamen of Petitioner's objections was that the punitive damage award violated Kentucky law. Petitioner's appeal was based exclusively on state grounds unrelated to the amount of the verdict, except for an unpreserved Eighth Amendment claim. The record of the state proceedings must affirmatively document any preserved federal issues. Issues first raised in a Petition for Certiorari have not been entertained by this Court. *Raley* v. *Ohio,* 360 U.S. 423, 433-436 (1959).

Petitioner's lack of preservation and proper presentation of this issue is almost identical to the lack of presentation in *Browning-Ferris, supra,* where the Court refused to address "due process" arguments concerning a $6 million punitive damage award:

> Petitioners claim that the due process question is within the 'clear intendment' of the objection it has made throughout these proceedings. Our review of the proceedings in the District Court and the Court of Appeals shows that petitioners' primary claim in both of those courts was that the punitive damages award violated Vermont state law. Petitioners also argued that the award violated the Eighth Amendment. We fail to see how the claim that the award violates due process is necessarily a part of these arguments. We shall not assume that a nonconstitutional argument also includes a constitutional one, and *shall not stretch the specific claims made under the Eighth Amendment to cover those that might arise under the Due Process Clause as well.* . . . In the absence of a developed record on the issues relevant to this due process inquiry, we shall not stretch the 'clear intendment' doctrine to include this case, as we do not think that the due process

> question is 'only an enlargement' of the Eighth Amendment inquiry. Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case, and *shall not attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals.* (p. 2921, fn. 23.) (emphasis added)

As with Petitioner's other questions, there is no preserved Fourteenth Amendment claim, and there is no record of any such due process claim developed in either the trial court or the Kentucky Court of Appeals. Lastly, even if Petitioner's questions were preserved, all of the questions presented in the Petition were fully addressed by the Court in *Haslip* and there is no need for further discussion. The Petition should be denied.

CONCLUSION

This case involves a catastrophic injury which occurred eight and a half years ago. As in the recent *Alm* petition which the Court denied, Petitioner now raises constitutional claims based on questions which were not preserved.

Petitioner urges this Court to accept a new constitutional principal which would mandate a trial judge to instruct the jury concerning certain unspecified "standards", when neither party requested any such instruction. Petitioner criticizes the trial judge for not instructing the jury on a "clear and convincing" evidence standard, even though it only requested that a "preponderance of evidence" standard be applied. Petitioner now claims the verdict was excessive under the Fourteenth Amendment, even though this claim was never made on appeal. Petitioner seeks to have this Court accept certiorari when it never properly raised

any of these issues below. If the Court adopts Petitioner's arguments, every unsuccessful litigant would have a plausible basis for seeking review in this Court.

Accepting jurisdiction in this case where issues were not preserved would degrade the prominence of the trial and the purpose of the established state practices for preserving error. At trial and during the state appeal, substantive state law and procedural rules provided both parties certain safeguards. Granting the Petition for Certiorari in this case would also destroy the purpose of these safeguards by suggesting that litigants need not adhere to them.

Finally, Petitioner surely does not believe in its own Petition. Petitioner, who has not claimed on appeal that the jury's verdict was unsupported by the evidence or based on passion and prejudice, has already paid the judgment in full.

The Petition for Certiorari should be denied.

Respectfully submitted,

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March 7, 1991

APPENDIX

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APPENDIX A

RENDERED: MARCH 30, 1990; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 89-CA-340-MR

REMINGTON ARMS COMPANY, INC. - - - *Appellant*

v.

NICHOLAS N. KING - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. Edwin A. Schroering, Jr., Judge
Civil Action No. 83-CI-8045

AFFIRMING

BEFORE: GUDGEL, STUMBO, and WEST, Judges.

WEST, JUDGE. This is an appeal from a judgment based on a jury verdict which awarded $417,926.47 in compensatory damages and $6,000,000.00 in punitive damages to the appellee. Mr. King, a competitive skeet shooter, suffered severe injury to his left hand and arm when a Remington 1100 12 gauge shotgun which he was firing exploded. The key issue at trial was whether this accident occurred due to defective design of the shotgun barrel or because of an improperly overloaded cartridge.

On appeal, Remington does not claim that there was insufficient evidence to support the jury verdict. Neither does it argue that the verdict is so excessive as to appear

to have been given under the influence of passion or prejudice. CR 59.01(d); *Davis* v. *Graviss*, Ky., 672 S.W.2d 928 (1984). Instead, the contentions on appeal, in regard to the amount of the verdict, are that the punitive damages instructions should have been based upon KRS 411.184 and that the award violates the Eighth Amendment prohibition against excessive fines.

Mr. King sustained his injuries in 1982. In 1983, this action was filed seeking compensatory and punitive damages. In the 1988 session, the General Assembly enacted House Bill 551 which has been codified as KRS 411.182 - KRS 411.188. These statutes, among other things, modify the law on punitive damages. KRS 411.184(2) requires clear and convincing evidence that the defendant acted toward the plaintiff with oppression, fraud or malice as a predicate to awarding punitive damages and KRS 411.186 sets out specific criteria to be considered in assessing the amount of punitive damages.

Remington argues that KRS 411.184 became effective on July 15, 1988, and is applicable to *all* cases tried after that date. This trial commenced on December 6, 1988. We believe this issue has been resolved by recent opinions of the Supreme Court and the trial court did not err in refusing to apply these statutes retroactively. *See, e.g., Sweasy* v. *King's Daughters Memorial Hospital*, Ky., 771 S.W.2d 812 (1989); *Koching* v. *International Armament Corp.*, Ky., 772 S.W.2d 634 (1989). In both of these cases, the Supreme Court found that application of a provision of this same house bill in a case where the event occurred prior to its enactment constituted impermissible retroactive application. *See, also, Floyd* v. *Carlisle Const. Co., Inc.*, Ky., 758 S.W.2d 430 (1988); *Conley* v. *Amer. Motors Corp.*, Ky. App., 769 S.W.2d 75 (1989). In light of these recent rulings on the issue, we find it unnecessary to further discuss the retroactivity argument.

Following this trial and the resulting large verdict, Remington sought a judgment NOV and/or new trial on the grounds that this $6 million dollar punitive damages award violated the constitutional prohibition against excessive fines. Without belaboring this point, we simply hold that the recent opinion of the United States Supreme Court in *Browning-Ferris Ind. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. ____, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), is dispositive of this issue. Therein, it was held that the excessive fines clause of the Eighth Amendment does not apply to punitive damage awards in cases between private parties. *Id.* at 2921. Appellant now contends that this decision was an "obvious invitation for a due process challenge" based upon the arbitrary lack of standards for punitive damages. Even if this were so, the issue was not raised in the trial court and we cannot *sua sponte* address issues which were never raised, no matter how challenging. Moreover, as our country's highest court noted in *Browning-Ferris, supra*, when performing the limited function of an appellate court, considerable deference must be accorded to the trial court's decision not to order a new trial. *Id.* at 2921-2922.

Finally, Remington argues that the plaintiff's counsel's reference to the shotgun's alleged financial profitability was prejudicial and an improper reference to the financial condition of a party. It appears from the verdict that the suggestions made by plaintiff's counsel in closing argument were indeed followed by the jury in determining the punitive damages award. This contention, therefore, causes us some concern but cannot serve as grounds for reversal.

It is true that Kentucky, through case law, has held that the financial condition of a defendant is not admissible in an action for punitive damages. *Hensley* v. *Paul Miller Ford, Inc.*, Ky., 508 S.W. 2d 759 (1974). Other jurisdictions have held that the defendant's financial worth is ad-

missible and relevant to the amount of a punitive damages award, which is meant to deter defendants from repeating misconduct as well as punish past behavior. *See, e.g., Ainsworth* v. *Combined Ins. Co. of America*, Nev., 763 P.2d 673 (1988); *Tolliver* v. *Mathas*, Ind. App., 538 N.E.2d 971 (1989); *Birchfield* v. *Texarkana Mem. Hospital d/b/a Wadley Hospital*, Tex., 747 S.W.2d 361 (1987). Some states require a prima facie showing of "entitlement" to punitive damages before evidence regarding net worth may be introduced. *Curtis* v. *Partain*, 272 Ark. 400, 614 S.W. 2d 671 (1981); *Campen* v. *Stone*, Wyo., 635 P.2d 1121, 1132 (1981); see also *Annot.*, 32 A.L.R. 4th 432 (1984). It would appear, from reading KRS 411.186, that our legislature has also concluded that such evidence of the "profitability of the misconduct" should be provided to the jury to assist it in assessing the *amount* of punitives, once it has been determined that punitive damages should be awarded. KRS 411.186(2)(c). However, as we have previously noted, KRS 411.186, also a section of House Bill 551 enacted by the 1988 General Assembly, is not applicable to this action.

Thus, *Hensley*, *supra*, stands as the most recent authority on the issue in this Commonwealth and would prohibit any showing of the respective financial conditions of the parties. *Id.* at 764. Nonetheless, we cannot reverse the judgment herein, as appellant did not preserve this error.

The profitability comparison made by plaintiff's counsel in closing argument was based upon facts before the jury regarding the cost of the Model 1100 and the total amount of gross sales, as well as the cost to remedy the alleged defect.

Remington's counsel did not object to plaintiff's counsel's "suggested method" of assessing punitives, except to state that one $500.00 estimated value of the shotgun was outside the evidence. That objection was properly over-

ruled because the letter containing that estimate had been introduced and there was no further complaint made. Attorneys should be granted latitude in making their arguments to the jury and drawing reasonable deductions from the facts adduced at trial. *Urban* v. *Walker*, Ky., 403 S.W.2d 11 (1966). Although the references herein may have exceeded the prohibition set forth in *Hensley*, *supra*, where there was no objection on that basis, we will not find it grounds for reversal.

The remaining issues on appeal relate to discovery and evidentiary rulings of the trial judge. At the outset of the trial, counsel for the plaintiff, in his opening statement, utilized posters to outline the facts expected to be proven at trial. Included on one of the posters was a statement that "only 12 gauge Model 1100's explode." Appellant now contends that the display of this poster, specifically the above statement, to the jury throughout the trial was inflammatory and prejudicial. It is further asserted that there was in fact no evidence to support that statement and that Remington was not permitted to establish its falsity. We have reviewed at great length the numerous tapes of this nine (9) day trial. Having done so, we cannot agree that the statement on this demonstrative aid, even if false, caused such prejudice as to warrant reversal.

Counsel is given wide latitude in directing the attention of the jury to all facts he in good faith believes will be established at trial. *Hollis* v. *Fisk*, Ky., 242 S.W.2d 1012 (1951). Even if the evidence is not thereafter produced, the conduct, though improper, does not necessarily lead to reversible error. *Id.*; *Bruner* v. *Gordon*, 309 Ky. 29, 214 S.W.2d 997 (1948). If the unproved evidence is considered prejudicial, the appropriate procedural remedy is a motion for a mistrial. *Williams* v. *Commonwealth*, Ky., 602 S.W.2d 148 at 149 (1980). No request was made for a mistrial at the close of plaintiff's case. Remington's only

objection at the conclusion of the proof was that there had been no testimony to the effect that "only Model 1100 12 gauge guns explode." Accordingly, the error, if any, is not preserved.

Appellant also maintains that it was denied the right to show that shotguns of other manufacturers also explode. Having reviewed the record, we do not agree that the court improperly restricted Remington's proof on this issue. One of Remington's witnesses was permitted to state before the jury that his company had received complaints of explosions involving models other than the Remington 1100. The court limited any further exploration into this area because the witness lacked the qualifications and personal knowledge to support that testimony. It is also apparent that Remington had previously sought to restrict this line of testimony when the plaintiff attempted to raise it and the court agreed. The trial court did not abuse its discretion, but merely exercised reasonable caution in its rulings which limited the amount of irrelevant and misleading information put before the jury.

Likewise, we find that the court below acted cautiously and within its discretion in permitting the introduction of prior similar occurrences. Remington argues that the evidence of other explosions was inflammatory and that the trial judge improperly permitted proof of other mere complaints. The language of *Montgomery Elevator Co.* v. *McCullough*, Ky., 676 S.W.2d 776 (1984), is squarely on point in this case. Evidence of similar product failures under similar conditions is clearly relevant and admissible in a products liability design defect case such as this. *Id.* at 783. The requirement of substantial similarity between the earlier accidents and the one at issue is a matter of relevance to be decided by the trial judge and will not be easily reversed. *Id.*; Lawson's, *Kentucky Evidence Law Handbook*, Second edition, §2.25 (1989 Supplement). Here,

the court carefully considered this issue prior to trial and set strict guidelines to insure that only substantially similar prior incidents would be admitted.

The existence of other similar complaints of explosions was revealed to King in Remington's responses to requests for admissions and interrogatories. If there was any error in that any of those complaints were not first shown to be substantially similar, it was both harmless and waived. *McCullough, supra*, at 784.

Appellant alleges two (2) violations of the civil rules pertaining to pretrial discovery. First, Remington objected to a statement by one of the plaintiff's experts, Dr. Ripling, on grounds that it was an opinion which should have been disclosed in interrogatories pursuant to CR 26.02. This contention is totally without merit. Dr. Ripling was deposed for three (3) days prior to trial and the plaintiff unquestionably provided defendant with the "substance of the facts and opinions to which the expert is expected to testify." CR 26.02(3)(a). We hold there was adequate disclosure and find no evidence of unfair surprise or "trial by ambush" as suggested by appellant. The intent of the rule, to enable counsel to prepare for cross-examination has been satisfied. *Newsome by and through Newsome* v. *Lowe*, Ky. App., 699 S.W.2d 748, 751 (1985).

Finally, appellant maintains that the trial court erred in refusing it discovery of Edward Crossman's findings, opinions and conclusions in this case. Plaintiff consulted Crossman, a firearms expert, prior to filing suit and in anticipation of litigation. He was utilized as a consulting expert, not expected to testify at trial and was never revealed by the plaintiff to the defendant as an expert for the plaintiff. When his identity was somehow discovered by appellant, it sought to take the discovery deposition of Crossman.

The appellee moved for a protective order relying upon *Newsome by and through Newsome* v. *Lowe*, Ky. App., 699 S.W. 2d 748 (1985), cited herein on another issue. The trial court conducted a hearing and held that Remington could not depose Crossman as the impressions, conclusions, or opinions of pre-litigation consultants are privileged. *Id.* at 751-752. We agree because Remington failed to make any showing of substantial need or exceptional circumstances. CR 26.02(3)(a). Now, Remington argues that it should have been permitted to call Crossman as a witness at trial in order to show that he was originally consulted by the plaintiff.

Although it does not appear that appellant even attempted to call Dr. Crossman as a witness, we note that the parties have no absolute right to know the existence of pre-litigation consultants who are not retained as experts for trial. Indeed, the purpose for restricting discovery of this type of material is to protect the confidentiality and encourage the use of such consultations in order to reduce the number of frivolous lawsuits. *Newsome, supra*, at 752. This form of evidence could be both prejudicial and irrelevant to the issues of the case and its admissibility is best left to the discretion of the trial judge. In its exercise of that discretion on this matter as well as the various other issues raised herein, we find no abuse.

In conclusion, the size of the verdict alone cannot be relied upon as evidence that defendant did not receive a fair trial when our review of the record indicates otherwise. As appellant has presented no argument before this Court which would warrant reversal, the judgment is affirmed.

All Concur.

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APPENDIX B

(Remington's Points and Authorities filed with the Kentucky Court of Appeals)

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(Kentucky citations omitted.)	
The Belated Opinion Of The Plaintiff's Expert That Remington Should Have Done Ultrasound Testing After Its Shotgun Barrels Were Proof Fired, Having Remained Undisclosed Before Trial In Violation Of CR 26.02(4)(a)(i), Was Not Thereafter Admissible.	12
(Citation omitted.)	
Remington Was Entitled To Depose Or Retain Colonel Crossman As Its Expert Witness Despite His Initial Contact By Opposing Counsel And The Trial	

Court's Refusal To Let It Do So Or Show The Plaintiff Previously Consulted Crossman Was Clearly Erroneous. 12

(Citations omitted.)

The "Clear And Convincing" Evidence Of "Malice" Now Required To Recover Punitive Damages By The 1988 Remedial Legislation Expressly Includes Pending Cases And The Trial Court's Failure To Apply Or Instruct The Jury On The New Statutory Standards And Definitions Or A Negative Converse Was Clearly Erroneous. 15

(Citations omitted.)

If The New Statutory Standards For Punitive Damages Did Not Apply Then Any Reference To The Shotgun's Alleged Financial Profitability Was Prejudicially Improper. 22

(Kentucky citations omitted.)

The Award For Punitive Damages May Violate The Constitutional Prohibition Against Excessive Fines. 23

Browning-Ferris Industries v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988), cert. granted 109 S.Ct. 527, 102 L.Ed.2d 559 24

CONCLUSION 24

APPENDIX

(Omitted.)

APPENDIX C

(Remington's constitutional argument to the Kentucky Court of Appeals)

We remind the Court that the case of Browning-Ferris Industries v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988), certiorari granted 109 S.Ct. 527, 102 L.Ed. 2d 559 is now pending before the United States Supreme Court on the question of whether an award of $6,000,0000 punitive damages is an antitrust case where the compensatory damages were $51,146 violates the prohibition against "excessive fines" in the Eighth Amendment to the federal Constitution.

We do so to reserve the point in the event that the decision in Browning, which we understand is imminent, is sufficiently broad to apply here as well.

APPENDIX D

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 83CI-08045

NICHOLAS N. KING - - - - - - - *Plaintiff*

v.

REMINGTON ARMS COMPANY, INC. and
SEABOARD SURETY COMPANY - - - - - *Defendants*

ORDER OF SATISFACTION

The Plaintiff, Nicholas N. King, acknowledges complete and total satisfaction of the judgments entered herein, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED.

(s) Martin Johnstone
JUDGE, Jefferson Circuit Court

(s) Jon Robinson
Jon D. Robinson
Counsel for Plaintiff

(s) William M. Butler, Jr.
William M. Butler, Jr.
Counsel for Plaintiff

(s) Nicholas King
Nicholas N. King
Plaintiff

APPENDIX E

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 83-CI-08045

NICHOLAS N. KING - - - - - - - *Plaintiff*

v.

REMINGTON ARMS COMPANY, INC. - - - *Defendant*

INSTRUCTIONS TENDERED BY THE DEFENDANT, REMINGTON ARMS COMPANY, INC.

Comes the Defendant, REMINGTON ARMS COMPANY, INC. (hereinafter called "REMINGTON"), by counsel, and moves the Court to give the jury the following Instructions:

I.

It was the duty of the Plaintiff in loading the ammunition and using and firing the shotgun about which you have heard evidence to exercise that degree of care for his own safety that is usually and customarily exercised by ordinarily careful and prudent users of shotguns like or similar to that referred to in the evidence and under like or similar circumstances.

If you believe from the evidence that the Plaintiff failed to observe this duty and any such failure on his part was a substantial factor in bringing about the accident and injuries of which he complains, then the law is for REMINGTON, and you shall so find.

II.

If you believe from the evidence that the Plaintiff's accident and injuries were due to some cause, condition, or circumstance other than improper design or manufacture of the shotgun about which you have heard evidence, then you shall find for REMINGTON even though you may further believe that the shotgun was not properly designed or manufactured.

III.

If you believe from the evidence that the shotgun about which you have heard evidence was reasonably safe for its intended use, then you should find for REMINGTON even though you may further believe that it differed in design or composition from similar shotguns produced by other manufacturers.

IV.

Any nine, ten, eleven or twelve of your number may make a verdict in this case. If your verdict is unanimous, only your foreperson, whom you yourselves shall choose, shall sign it. If your verdict is agreed upon by nine, but less than all of you, then each juror agreeing upon the verdict shall sign it.

DATED: December 6, 1988.

_____

Judge

Tendered By:

SPECKMAN & LONG

(s) Thomas W. Speckman
Thomas W. Speckman

(s) William A. Hoback
William A. Hoback
2220 Citizens Plaza
Louisville, Kentucky 40202
(502) 587-1500

ATTORNEYS FOR DEFENDANT,
Remington Arms Company, Inc.

APPENDIX F

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 83-CI-08045

NICHOLAS N. KING - - - - - - - *Plaintiff*

v.

REMINGTON ARMS COMPANY, INC. - - - *Defendant*

SUPPLEMENTAL INSTRUCTIONS TENDERED BY THE DEFENDANT, REMINGTON ARMS COMPANY, INC.

Comes the Defendant, REMINGTON ARMS COMPANY, INC. [hereinafter called "REMINGTON"], by counsel, and moves the Court to give the jury the following Supplemental Instructions:

I.

In order to award punitive damages against REMINGTON, *you must be satisfied* that not only that REMINGTON designed or manufactured a product that was unreasonably dangerous for its intended use and that the Plaintiff was thereby injured, but that REMINGTON acted with malice in designing or manufacturing the shotgun about which you have heard evidence. (emphasis added)

"Malice", as such term is used in this Instruction, means either conduct which was specifically intended by REMINGTON to cause tangible injury to the Plaintiff, or conduct that was carried out by REMINGTON both with a flagrant in-

difference to the rights of the Plaintiff and with a subjective awareness that such conduct would result in human death or bodily harm.

II.

If the Court refuses to give Supplemental Instruction No. I hereof, REMINGTON asks that the following Supplemental Instruction be given:

In order to award punitive damages against REMINGTON, *you must be satisfied* that not only that it designed or manufactured a product that was reasonably dangerous for its intended use and that the Plaintiff was thereby injured, but that REMINGTON did so in such reckless and wanton disregard of the rights and safety of persons such as the Plaintiff who would be using and handling and firing the shotgun about which you have heard evidence as to justify such an award in your discretion to deter REMINGTON and other manufacturers from like or similar acts or conduct. (emphasis added)

DATED: December 16, 1988

_____

Judge

Tendered by:

SPECKMAN & LONG

(s) Thomas W. Speckman
Thomas W. Speckman

(s) William A. Hoback
William A. Hoback
2220 Citizens Plaza
Louisville, Kentucky 40202
(502) 587-1500

Attorneys For Defendant,
Remington Arms Company, Inc.

APPENDIX G

IMPORTANT SAFETY WARNING TO OWNERS OF RUGER P-85 9MM PISTOLS

We have recently learned of a broken firing pin in a P85 automatic pistol which caused the pistol to fire as a result of decocking. This is the first report of this nature in over 200,000 pistols delivered to customers since 1987. No injury occurred because the shooter kept the pistol pointed in a safe direction during decocking.

Nevertheless, we regard this incident as important because is reveals a potential danger which we are prepared to eliminate in all P85 pistols now in use. This modification is very simple and does not alter the handling or appearance of this pistol, but it must be installed at the factory.

Accordingly, we urgently request that all owners of P85 pistols contact us immediately to obtain any further information they may desire, and to arrange for return of their P85 pistols to the factory for modification. Please contact us at:

STURM, RUGER & CO., INC.
Dept. S, Ruger Road
Prescott, AZ 86301

Or call us for P85 inquiries *only* at: 1-800-424-1886. Please have your pistol serial number available when contacting us.

We will schedule your gun for factory installation of a new safety/decock system free of charge. It will prevent this type of accidental firing even in the rare event of firing pin breakage.

This free safety modification applies *only* to pistols rollmarked "P85" on the slide. Pistols which are rollmarked

"MKII" will have these modifications as part of their original manufacture, and are not subject to this modification.

We are also taking this opportunity to remind shooters of the most common and basic firearms safety rule:

ALWAYS KEEP THE PISTOL POINTED
IN A SAFE DIRECTION!

This is particularly important when loading, unloading, or decocking any pistol.

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